

AN ANALYSIS OF THE CONCEPT OF PRISONERS OF WAR UNDER ISLAMIC AND INTERNATIONAL HUMANITARIAN LAWS

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ABSTRACT

This research work has given a vivid account of Prisoners of War, their status and the status of combatants/non-combatants, children and women under the Islamic Humanitarian Law and International Humanitarian Law. Furthermore, the work examined various rights a prisoner of war has by virtue of his position as well as his general treatment while being interned. This work also highlights on the similarities and dissimilarities between the Islamic and International Humanitarian Laws in relation to prisoners of War. The work concludes with some suggestions on how a new approach to the present situation should be adopted.

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1.0 INTRODUCTION

Prisoners of war are a product of any war. Long before the Geneva Convention on treatment of Prisoners of war, Islamic law established some rules for fair and humane treatment of the Prisoners of war. Therefore, this Paper will attempt to examine the history of Prisoners of war in Islam, the concept of Islamic law of war, the meaning of Prisoners of war under International humanitarian law, Others whose status Upon capture is Prisoner of war, General treatment of Prisoners of war under International humanitarian law, Similarities and differences between Islamic humanitarian law and International humanitarian law in relation to Prisoners of war, Conclusion and recommendation.

1.1 HISTORY OF PRISONERS OF WAR IN ISLAM

The history of prisoners of war in Islam could be traced to the Battle of *Badr*.¹ About seventy (70) Prisoners of war were captured. They were soon freed, and in some cases those who were literate were asked to teach in lieu for their release. Among the prisoners that were taken were the Prophet Muhammad (S.A.W) uncle Abbas and sayyidna Ali's brother Aqil who after wards became Muslims.² Abbas was an ancestor of the founder of the celebrated Abbasid dynasty which played such a notable part in Islamic history. In the case of all the prisoners, if there was any good in their hearts, their very fight against Islam and their capture led to their being

¹ Abdulrahman I Doi, *Shari'ah the Islamic Law* (Ta Ha Publishers, U.K 1997) page 447.

² Ibid.

blessed with Islam. Thus, Allah's plan works in a marvelous way, and evolves good out of seeming evil. The Qur'an says:-

"O Apostle! Say to those who are Captives in your hand; if God findeth any good in your hearts, He will give you something better than what has been taken from you and. He will give you; for God is oft-forgiving Most Merciful."³

This verse gives a consolation to the prisoners of war that in spite of their previous hostilities, Allah will forgive them in His Mercy if there was any good in their hearts, and confer upon them a far higher gift than anything they have ever lost. This gift in its highest sense would be the blessing of Islam. Kindness must be shown to the prisoners of war, one must not start thinking that if we show kindness to them and release them, they will again create problems for the Ummah. The matter should be left to Allah. The Qur'an provides "But if they have treacherous design against you, (O Apostle) they have already been in treason against Allah and so hath He given (you) power over them, And Allah is He who hath (full) knowledge and Wisdom."⁴

If the kindness shown to them is abused by the prisoners of war when they are released, it is not a matter of discouragement to those who showed the kindness. Such persons have in their treachery shown already their treason to Allah, in that they took up arms against Allah the punishment of defeat which opens the eyes of some of their comrades evidently did not open their eyes. But Allah knows all, and in His wisdom will order all things for the best. The believers have done their duties in showing such elemency as they could in the circumstances of war, for them "Allah suffices".⁵

1.2 THE MEANING AND TREATMENT OF PRISONERS OF WAR UNDER ISLAMIC HUMANITARIAN LAW

Under the Shari'ah, if a person takes up arms against you, you are allowed to defend yourself and in so doing if you subdue or defeat him he will eventually become your prisoner. A prisoner of war or captive is defined as a person who is captured or interned during a war.⁶

Long before the Geneva conventions on treatment of prisoners of war (POW), Islamic law of war has established some rules of fair and humane treatment of the prisoners of war. The Qur'an makes illusion to the issue of taking prisoners of war, where Allah (S.W.A) says "So when you meet those who disbelieve (in battle) strike (their) neck until when you have inflicted slaughter upon them, then secure their bonds, and either (confer) favour afterwards or ransom (them) until the war lays down its burden."⁷

In another verse, the Qur'an also says "It is not for the Prophet to have captives (of war) until he inflicts a massacre (upon Allah's enemies) in the land..."⁸

Islamic law of war places a great premium on kind of treatment to prisoners of war. When Prophet Muhammad (S.A.W) enjoined Muslims to treat the prisoners of war captured at the battle of *Badr* with kindness and fairness, many Muslims soldiers were contended with dates and water while they fed their prisoners with bread."⁹

³ *Qur'an* Chapter 8 verse 70

⁴ *Qur'an* Chapter 8 verse 71

⁵ *Qur'an* Chapter 8 verse 62

⁶ *The Dictionary Al Qamus, Arabic – English* (Dar Al Kotob Al Ilmiyah Publishers, Lebanon 2008) page 72.

⁷ *Qur'an* Chapter 47 verse 4

⁸ *Qur'an* Chapter 8 verse 67

⁹ M. Muntaqa Mahboub op cit at page 35

Prisoners of war are to be well taken care of, and given protection from heat and cold. A mother should not be separated from her baby or other close relatives from each other. Based on the above, Islamic law of war provides the following rights to the prisoners of war, thus:

1.2.1 They should be provided with food

Prophet Muhammad (S.A.W) is reported to have said: “They (Prisoners of War) are your brothers, so feed them from the food you are eating and cloth them from the cloth you are wearing.”¹⁰

1.2.2 Clothing Them

Prisoners of war should be provided with a cloth that will suit the particular season they are in. It has been said that, during the battle of *Badr*. Abbas was captured and brought before Prophet Muhammad (S.A.W) without proper dressing on him. Immediately, the (Prophet) provided him with suitable cloth for that season.¹¹

1.2.3 Shelter

Prisoners of war are entitled as of right to be provided with shelters and with all the required facilities that will cater for the need of the place and season. Males should be separated from the females. In other words, each gender should be given separate accommodation. They should not be mixed in the same house/prison.¹²

They should not be required to carry out work beyond their ability. They should equally not be mutilated. The above are the right accorded to prisoners of war by Islamic Law of war right from their capture up to the cessation of hostility. When the hostility comes to an end, the Muslim Leader is given options by Islamic Law of war with regards to prisoners of war. The options open to him (P.O.W) are; to be released free of charge, to be required to pay ransom either in cash or in kind for his release and they (prisoners of war) may even be enslaved or killed based on the practice of Prophet Muhammad (S.A.W). The Qur'an provides: “ It is not fit for a Prophet that he should take captives unless he has fought and triumphed in the land...”¹³

1.3 THE ISLAMIC LAW OF WAR

Islam permits war but keeps it within the strict rules and limits. Islamic law of war has set down certain rules which are merciful and considerate to people and required Muslims to observe them. Islamic law of war has first drawn a clear line of distinction between the combatants and non-combatants. As far as the non-combatants population are concerned. Such as women, children, the aged and clergies, the instructions of Prophet Muhammad (S.A.W) are as follows: “Do not kill any old person, any child or any women do not kill the monks in the monasteries.”¹⁴

Prophet Muhammad (S.A.W) came across a slain woman while riding in battle, he frowned with anger, and instructed: “Do not kill women and innocents, monks or other religious leaders who are deemed non-combatants. No wanton killing of livestock and animals. No burning or destruction of trees and orchards and no destruction of wells.”¹⁵

¹⁰ Ibid at page 36.

¹¹ Ibid at page 37

¹² Ibid at page 37

¹³ *Qur'an* Chapter 8 verse 67

¹⁴ M. Muntaqa Mahboub op cit at page 102

¹⁵ Ibid at page 102

Sayyidina Abubakar As Siddiq, the first caliph (Successor to the Prophet), formulated a detailed set of rules for Islamic conduct during war. He gave the following instructions to a Muslim army setting out of Syria, which was then governed by Byzantine Empire, thus;

“Stop, O peoples, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies neither kill a child, nor a woman nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy’s flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services leave them alone.”¹⁶

In essence, Islamic law of war granted protection to all civilian population, women, children, religious, personnel, aged persons and all other category of persons who did not actually take part in hostility through any other means as well as their objectives. It also extended such protection to combatants who are incapable to continue with hostility as a result of sickness (*Hors de combat*) injury, capture/surrender (i.e those rendered *hors de combat*). In essence, the main objective of armed conflict under the Islamic law is to defend faith and self by way of defeating the adverse party with the least possible expenditure of men, resources and money, bearing principle of humanity in mind.¹⁷

2.0 THE MEANING OF PRISONER OF WAR (P.O.W) UNDER INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is the law that regulates the conduct of war (*jus in bello*). It is that branch of International law which seeks to limit the effects of armed conflict by protecting persons who are not participating in hostilities. It includes the Geneva Conventions and the Hague Conventions, as well as subsequent treaties, case law, and Customary International law.¹⁸

The International Humanitarian Law is mainly constructed on the foundation of two privilege classes: combatants and non-combatants (civilians). Combatants have the ‘rights’, to participate directly in hostilities. That is the combatant’s privilege. It means that they are immune from prosecution for participating in lawful acts of war such as the killing of the enemy’s soldiers or destroying enemy’s military objectives. However, such immunity does not cover prosecution for the commission of violation of International Humanitarian Law.

Combatants are recognised as legitimate objects of attack at all times whether on duty or off duty, and when they are captured, they enjoy the status of prisoners of war.¹⁹ A prisoner of war is a person, usually a soldier who is captured by or surrenders to the enemy in wartime.²⁰

Prisoners of war are persons belonging to one of the following categories, who have fallen into the power of the enemy as provided in Article 4 to the Geneva Convention of 1949.

1. Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces,

¹⁶ Ibid

¹⁷ Ibid

¹⁸ International legal frameworks for humanitarian action: Topic guide. Birmingham, UK: available at <http://www.gsdrc.org/go/topic-guides/ilfha> visited on 17th February, 2016.

¹⁹ Jan M. N. Islam et al; *International Humanitarian Law* (I. I. U. M Press Malaysia 2015), page 114.

²⁰ Bryan A. Gardner, *Black’s Law Dictionary* 9th edition (West Publishing Co. USA, 2009) page 1314

2. Members of other militias and members of other volunteer corps including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
 - a. That of being commanded by a person responsible for his subordinates;
 - b. That of having a fixed distinctive sign recognizable at a distance;
 - c. That of carrying arms openly;
 - d. That of conducting their operations in accordance with the laws and customs of war;
3. Members of regular armed forces who profess allegiances to a government or an authority not recognised by the detaining power.
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military, aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
5. Members of crews, including masters, pilots and apprentices of the merchant marine and the crew of civil aircraft of the parties to the conflict, who do not benefit by more favourable treatment under any other provision of International law.
6. Inhabitants of a non occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The following shall likewise be treated as prisoners of war under the present convention.²¹

1. Persons belonging to or having belonged to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat or where they fail to comply with a summons made to them with a view to internment.
2. The persons belonging to one of the categories as enumerated in the present Article, who have been received by neutral or non belligerent Powers on their territory and whom these Powers are required to intern under international law without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Article 8, 10, 15, 30, 5th Paragraph, 58-67, 92, 126 and where diplomatic relations exist between the parties to the conflict and the neutral or non belligerent power concerned, those articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these Persons depend shall be allowed to Perform towards them the functions of a Protecting Power as provided in the present convention without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties”.

²¹ 1949 Geneva Convention III, Article 4.

2.1 GENERAL TREATMENT OF PRISONERS OF WAR UNDER THE INTERNATIONAL HUMANITARIAN LAW

The third Geneva Convention of 1949 has been dedicated to the treatment of prisoners of war. For that, a comprehensive list of categories of persons who are considered as prisoners of war is given in article 4 as we have earlier aforementioned.²² It should be noted however that, not all those falling into the hands of power of the enemy becomes prisoners of war or are entitled to prisoners of war status. Enemy civilians, for example, when taken into custody or interned do not fall into this category and if captured are entitled to treatment in accordance with the provisions of the Geneva Convention IV of 1949.²³ Prisoners of war must be treated humanely and protected at all times, particularly against any violence or intimidation, as well as against insult and public curiosity.²⁴ The responsibility for the treatment of prisoners of war rest upon the detaining Power.²⁵ Article 14 together with article 75(2) of the additional protocol 1 provide protection against physical violence or torture in the person of prisoner of war. They must not be exposed to condition likely to affect their health, due attention being paid to the climate and must not be exposed to the dangers of the zone of operations and should be provided with air raid shelters.²⁶ The location of their camps which are to be clearly marked “PW” or “PG (Prisoners deguarre)” is to be given to the adverse party through the medium of the Protecting Power and should not be cited near military objective. They are to be provided with proper shelter and food as well as proper medical treatment and should on no account be subjected to any medical or scientific treatment or experimentation which is not required by their own state of health.²⁷

Any prisoner who dies must be buried honourably and if possible according to his/her own religious rites and in an individual grave, cremation is allowed at the request of the deceased, in accordance with his religious belief or for reason of hygiene. The grave should be properly marked and information recorded with the Grave Registration Service maintained by the detaining power. Whenever possible, dead prisoners should be buried with their own nationals.²⁸

Female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must be taken into consideration in the allocation of labour and the provision of sanitary and sleeping facilities.

Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.²⁹ If children are arrested or otherwise detained for reasons connected with the conflict, they must be kept separate from adult detainees, unless they are held in family unit.³⁰ Children under fifteen years should not be recruited into the armed forces and every effort should be made to prevent their taking part in conflict.³¹

²² Jan M. N Islam et al op cit at pages 45-46

²³ Ibid.

²⁴ 1949 Geneva Convention III, Article 13.

²⁵ 1949 Geneva Convention III, Article 12.

²⁶ 1949 Geneva Convention III, Article 13 and 19.

²⁷ 1949 Geneva Convention III, Article 13, 15 and 26.

²⁸ C. Green Leslie op cit at page 202

²⁹ 1977 Additional Protocol II, Article 77 (1)

³⁰ 1977 Additional Protocol II, Article 77 (4)

³¹ 1977 Additional Protocol II, Article 77 (2)

If any child who has participated in hostilities is captured he continue, even treated as prisoner of war to enjoy the special protection granted to children. If the child commits an offence connected to the conflict or even a war crime, he must not be executed until he attained eighteen years of age or above at the time of the commission of the act in question.³²

3.0 SIMILARITIES BETWEEN ISLAMIC HUMANITARIAN LAW AND INTERNATIONAL HUMANITARIAN LAW IN RELATION TO PRISONERS OF WAR

Both legal systems have similarities or they share certain things in common between them in relation to the issue of treatment of prisoners of war, under both laws. It is clear that upon capture, the prisoners must at all times be guarded and not ill-treated, that they should also be humanely treated, be protected against all acts of violence, intimidation, insult, etc. No form of physical or mental torture is allowed nor any other form of coercion may be inflicted on them. Women and children prisoners of war cannot be killed under any circumstances, regardless of their faith, they should be well fed, cloth and kept in a healthy and hygienic environment. Both laws have provided that Prisoners of war must be provided with shelters and clothes taking into consideration the weather or climatic condition they are in.

3.1 DIFFERENCES BETWEEN ISLAMIC HUMANITARIAN LAW AND INTERNATIONAL HUMANITARIAN LAWS IN RELATION TO PRISONERS OF WAR.

Islamic law of war permits enslaving prisoners of war, where as enslavement of prisoners of war is made a war crime under the International Humanitarian Law.³³ Under the Islamic law of war, killing of prisoners of war is permitted in certain circumstances e.g it is the view of Imam Malik, Iman Shafi'I and Imam Abu Hanifa that prisoners of war who are believed to be extremely dangerous may be killed by the order of the Imam (Head of Islamic Government), they based their ruling on the practice of Prophet Muhammad (S.A.W) when he ordered the killing of Ukubat Bin Abi Mued, Nadharad Bin Harith and Hilal Bin Al-Adal after the battle of *Badr*.³⁴ Where as killing prisoners of war woefully is considered among the war crimes under International humanitarian law.³⁵

3.2 CONCLUSION AND RECOMMENDATION

Having discussed fully on prisoners of war under the Islamic and International Humanitarian Laws, and putting into consideration the Global War on Terrorism, United State and Iraqi conflict as while as conflict between Israel and Hosbullah an armed group in Lebanon. There is very clear and serious violations of both Islamic and International humanitarian laws accorded to Prisoners of War. Therefore, the United Nations Organization (U.N.O) or other Concerned Bodies need to put more efforts to ensure that the provisions of the International Humanitarian Law are complied with so that prisoners of war are given due protection.

³²1977 Additional Protocol 2, Article 77 (3) and (5)

³³ 1949 Geneva Convention III, Article 118.

³⁴ M. Muntaqa Mahboub op cit at pages 103-104

³⁵ 1949 Geneva Convention III, Article 13.